service proceedings demonstrates, real-world costs of operating a cable system are in fact far in excess of this benchmark approach.

In the context of proceedings regarding the regulation of its rates, Continental has presented extensive evidence regarding the costs it incurs in providing regulated cable services. Those cost-based rate filings demonstrated an average per-channel cost of service of approximately $0.87 per channel.[24] This figure could also serve as a reasonable "base" rate for charges to leased access providers.

Continental recognizes that reasonable people have differed in their approaches to many elements of cost-of-service showings relating to subscriber rates. The inclusion of acquisition premiums and accumulated return deficiencies ("ARDs") in rate base was finally compromised in the final cost of service rules.[25] But whatever reservations one may have for including acquisition premiums and full ARD in the context of setting basic and tiered subscriber rates simply do not apply in the context of setting leased access rates.

Continental's filings explained in detail why it was necessary to include a properly-calculated ARD in the rate base of so-called "build-and-hold" systems. Boiled down to its

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[24] ***See*** Attachment 4 hereto, which summarizes the per-channel rates demonstrated in Continental's cost-of-service filings.

[25] Continental settled its cost of service cases as part of Social Contract. The Company's CPST rates were defended on cost of service principles and found reasonable. Continental did not set those rates to recover the full cost of service, because the Company continues to build its subscriber base under the conventional economics of cable television.

essentials, building a cable system with a large, loyal subscriber base requires the expenditure of large amounts of money over many years, with no current returns available on that investment during the time that the system is being built out and penetration is being increased. The ARD does nothing more than recognize that this investment, including a fair return on money that remains invested in the system for many years, actually exists.[26]

Cable system penetration and loyalty has been built up over time by charging subscribers a lower rate than their true economic costs might justify. In establishing ratemaking principles for subscriber rates, the Commission has repeatedly suggested that one reason to limit the inclusion of all ARD in the ratebase is because "these costs presumably ... were incurred in the expectation of ... profits from nonregulated activities, and thus should not be borne by current and future subscribers." "It is also quite likely that acquisition prices included assessments of the profits that might be gained from emerging cable services that remain unregulated but could be expected to experience more rapid growth and penetration than those services that were made subject to regulation. Premium services such as HBO and Showtime, pay-per-view services, interactive services such as home shopping, and other offerings all represent newer sources of profit with greater potential for expansion."[27] In other words, the

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[26] ***See, e.g.,*** Comments of Continental Cablevision, Inc., et al., ***supra***; Kane, Reece, Associates, Inc., "Accumulated Return Deficiency Study," ***supra***. The seller of a system that has endured these years of losses and low earnings will reasonably require compensation for them in the price of the system. The part of the purchase price related to compensation for prior years' losses and low earnings are recorded on the purchaser's books as an intangible asset or "acquisition premium." As with the ARD, there is nothing unfair or inappropriate about including an acquisition premium in the rate base.

[27] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Report and Order,* MM Docket 93-215, CS Docket 94-28, FCC 94-39, 9 FCC Rcd 4527 at ¶¶ 74, 92 (March 30, 1994).

Commission has told the cable industry to recover prior costs through nonregulated use of channel capacity. Now the Commission proposes to benefit the commercial leased access programmer without any contribution to the recovery of those prior losses; while simultaneously impeding the recovery of such costs through unregulated services.

In the context of leased access rates, the statute dictates that rates "at a minimum" will "assure" that there is no adverse financial impact on the cable operator. There is no room under this statutory standard for the Commission to disallow or otherwise ignore the true economic costs of operating a cable system, whether or not those costs would be included in a cable programming service tier case or typical public utility rate case.

The Commission's own analysis in another context supports this assessment. When establishing more lenient cost-of-service rules for "small" cable systems, the Commission determined that per-channel per-month rates as high as $1.24 would be presumed to be reasonable. This conclusion was based on an analysis of the cost showings made by thirty-five small systems, many of which included rate base items such as ARDs and acquisition premiums and used economically reasonable methods to allocate total system costs among tiers of service. That analysis showed that the *average* small system cost was $0.93 per channel per month.

Continental is not, of course, suggesting that it is in any respect a "small" system operator, and is not suggesting that the Commission's "small system" analysis should be applied to Continental or any other large MSO in the context of setting subscriber rates. In the context, however, of setting a leased access rate that is "at a minimum sufficient to assure" that cable operators are made whole, the Commission's analysis of average system costs shows that Continental's cost-of-service showings do not produce rates that are facially unfair or unreasonable.[28]

Another check on the reasonableness of Continental's cost figures can be obtained by comparing them to the rates at which programmers can obtain carriage on over-the-air broadcast stations. In the Washington, D.C. Designated Market Area (DMA) (with approximately 1.88 million TV households), time may be purchased from over-the-air broadcast stations in half-hour increments. The average lowest price available from those stations (for highly undesirable time slots in the early morning hours) was $996 per half hour. The average highest price available (for somewhat more desirable times), was $6,867 per half hour. Conservatively weighting these figures at 90% for the lower rate and 10% for the higher rate, and converting to a monthly figure, the cost per "subscriber" for a complete channel would be $1.21 per viewer per month.[29] While the comparison is not exact, and is not offered as a basis for setting specific leased access rates, this clearly shows that a leased access rate based on costs in the $0.87 range would not be unreasonable in an actual market for video carriage.[30]

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[28] To the extent that leased access rates are to be based on costs, an approach to issues such as ARD and acquisition premiums similar to that adopted for subscriber rates in cost-of-service systems could be used. Specifically, the maximum permitted leased access rate could be a rate based on a full accounting of cost, as described above, as long as that rate did not exceed a leased access rate based on the "highest implicit fee" approach now in use. As a result, no leased access provider would experience a rate increase based on a cable operator's costs.

[29] ***See*** Affidavit of Cathleen A. Schultz, attached as Attachment 5 hereto.

[30] In this regard, the Commission has previously determined that cable operators do not exercise market power in the areas of local programming and local advertising, both of which characterize leased access programming. In its proceeding regarding *Horizontal and Vertical Ownership Limits,*
(continued...)

IV. THERE WOULD BE OTHER SUBSTANTIAL HARMS CAUSED BY IMPLEMENTING THE NPRM'S PROPOSAL.

A. Treatment Of Part-Time Leased Access.

Continental has noted before that if part-time leased access rates are simply the product of a ratable reduction in the full-time channel rate to a half-hour increment, the rates are arbitrarily low. Indeed, it creates a price for an infomercial "programmer" which is far below the comparable advertising rate in any medium. In its proceeding regarding *Horizontal and Vertical Ownership Limits,* the Commission found that "cable operators do not possess undue power in local programming or advertising markets where they face competition from local broadcast stations and other multichannel program distributors."[31] On this basis alone the Commission should conclude that part-time channel lessees have ample alternatives in a fully competitive market,[32] and that the prices charged to advertisers as part-time channel lessees should therefore be deregulated.

There is another cost to part-time carriage for which the Commission must account. Time within a cable channel is not divisible into day-parts or hours in precisely the

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[30](...continued)
the Commission stated that "cable operators do not possess undue power in local programming or advertising markets where they face competition from local broadcast stations and other multichannel program distributors." 8 FCC Rcd 8565 at ¶ 17 (1993). This confirms that the use of over-the-air broadcast carriage rates as a check on the reasonableness of proposed leased access rates is not unreasonable.

[31] 8 FCC Rcd 8565 at ¶ 17 (1993).

[32] ***See also*** Schultz Aff., ¶¶ 3-4 (documenting that at least nine of ten commercial broadcast stations in the Washington, D.C. DMA sell time in half-hour blocks to third parties).

same manner as is common in broadcasting. A broadcaster will typically select several different genre of programming to attract different demographics throughout the broadcast day. Thus, it is the rare broadcaster who programs the entire day with the same genre of programming, and it is common for programmers seeking access to broadcast time to produce for half-hour or hour increments.

A cable channel follows a fundamentally different model. Like radio broadcasting, genre differentiation in cable is usually channel by channel, rather than day-part by day part. Thus, when a cable television programmer is negotiating with a cable operator for carriage, the programmer is not usually seeking part-time carriage. Indeed, it is Continental's experience, and the experience of the cable programming community generally, that it is impossible for new services to sell in the national advertising marketplace if the service is carried only on a part-time basis. Thus, it is essential to a new programmer seeking to develop itself as a national service that it have access to a full-time channel.[33]

The Commission's approach to part-time leased access has been to superimpose a broadcasting model on cable television without regard to the real-world effect. The Commission has ameliorated this somewhat through case law by holding that it is permissible for a cable operator to insist upon a minimum buy, but the real problem is the externalities of a part-time lease.

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[33] Stengel Aff., ¶¶ 44-45.

When an advertiser/infomercial producer leases less than the full-time channel, the advertiser has devalued that channel substantially. The channel is no longer suitable for, say, the launch of a History Channel, because use of the channel is preemptible, part-time, and therefore not suited to the needs of the History Channel to develop itself in the national advertising marketplace.[34]

Continental suggests that the problem be remedied directly, by extending price regulation only to commercial leased access applicants who would rent a full time channel, which accords with the original intent of Congress to create programming diversity, not more advertising. But if the Commission decides to nonetheless create a pathway for advertisers to use commercial leased access, then these advertisers must be made to pay for the unused time on the remainder of the leased channel. As more part-time programmers are added to the channel, the amount of the unused time would decrease and the ratable share would decrease. But in all cases, the price for the channel should aggregate to the price of a full time lease today—not, as in the current rules, the price which would hypothetically be collected if every hour were rented by commercial leased access programmers.

B. The Commission Must Implement A Reasonable Transition Mechanism.

Any major change in commercial leased access pricing must be phased in gradually in order to avoid massive disruption for Continental and its cable customers. Without

[34] *Id.*

an adequate transition, cable operators would be placed in breach of their affiliate agreements and would confront substantial problems in realigning channels locked in through traps.

Continental's carriage contracts, which have been reasonably negotiated under current standards, have an average term length of more than six years, and an average of almost four years to run before expiration. These contracts were entered into in reasonable reliance on the regulatory regime prevailing from 1984 through the present.[35]

Nor may an operator simply place a commercial leased access programmer on any channel which happens to be designated to be dropped. Channels are often offered in neighborhoods.[36] Until a system becomes 100% addressable, it is constrained by the technical limits of traps and filters to current configurations, unless every home is retrapped. That is why Congress provided until 2002 to come into compliance with the "no buy through" rule, and why the Commission exempted systems from the no buy through rule until they become addressable.[37]

Although a complex scheme could be developed in which each system is subject to its own transition, based upon its addressability, franchise commitments, date of renewal and existing affiliation agreements, it would be more straightforward to adopt a nationwide phase-in of any new leased access carriage requests. A failure to implement a workable transition period

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[35] ***See*** Stengel Aff., ¶¶ 40-41.

[36] ***See*** Stengel Aff., ¶¶ 9-11, 43.

[37] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Buy-Through Prohibition, *Report & Order*, MM Docket No. 92-262, FCC 93-143, 8 F.C.C.Rcd. 2274 (released March 11, 1993).

will result in enormous market dislocation for cable operators and programmers, and most importantly, for subscribers.

C. Other Difficulties With The NPRM's Proposal.

1. Procedures For Designating Channels For Leased Access.

The Commission's proposal that cable operators designate in advance the services to be deleted in preference to commercial leased access programmers is unwise. Under any regime, such advance designation would maximize harm to a cable operator.[38] Continental believes that it would be needlessly destructive of new programmers' efforts to establish themselves among audiences and advertisers if they were labelled, in advance of any demand for access time, to be the channel slated for preemption. The Commission should not require operators to designate channels in advance.

2. Leased Access Prices in Systems Subject To Effective Competition Should Be Deregulated

The Commission's premise in revising the leased access rules is to protect leased access providers against exercise of operator market power. In markets in which there is effective competition, there is no reason to presume that there is any market power. In such markets, there is no market-based need to impose a maximum leased access rate at all. Indeed, if there is effective competition, any "scarcity" rationale for leased access no longer exists,

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[38] Stengel Aff., ¶ 43-45.

because there is an alternative non-broadcast route to the home, conclusively established by Congress to constitute an adequate choice. For these reasons, in markets which are subject to effective competition, regulatory pricing constraints on commercial leased access channels should be eliminated.

3. The Proposal To Shift From Low Regulated Rates To Market-Based Rates Is Ill-Defined and Unworkable.

The NPRM has suggested that when all the leased access channels are filled, "market" rates would govern.[39] The fundamental problem with this concept, as detailed above, is that market rates are required by law to govern the pricing of all channels, including the first. Moreover, there are immense practical problems. For example, if all programmers shifted to the new, "market" rate, what would happen when someone drops off? Given that the Commission's regime contemplates part-time lessees, a substantial churn in commercial leased access channels must be anticipated. The proposal to limit market pricing to some later period of time is unlawful and unworkable.

V. THE MARKETPLACE HAS FULFILLED THE KEY PURPOSES OF SECTION 612.

Leased access is governed by Section 612 of the Communications Act, so leased access pricing proposals must be assessed in light of the purposes of that provision. The NPRM assumes that today's low level of leased access programming means that those purposes are unfulfilled.

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[39] NPRM at ¶¶ 96-97.

Section 612 was added to the Communications Act in 1984 to ensure that there is a diversity of voices available on cable systems by requiring cable operators to carry a certain amount of programming brought to them by third parties.[40] The 1984 Act left the determination of the price of carriage to cable operators, subject to the statutory standard that rates be "at least sufficient to assure that [leased access] will not adversely affect the operation, financial condition, or market development of the cable system." The 1992 Cable Act did not change the underlying statutory standard. In order to facilitate actual negotiations between cable operators and leased access providers, however, the 1992 Act directed the FCC to establish maximum permitted leased access rates that were consistent with that standard.[41] The "highest implicit fee" formula was established in response to that directive.

There is no evidence that there is any lack of "diversity" in video programming on cable systems today. To the contrary, there has been an explosion of video programming available on cable since Section 612 was enacted. More than 80 new cable networks have been launched since 1984. Continental's "average" system today offers over fifty channels of video programming addressing a wide range of interests. These include programming of broad interest such as CNN, ESPN, USA Network, and the Discovery Channel, as well as programming focused on much narrower areas of interest, such as HGTV. Moreover, to the extent that the statute's concern was that programming on cable systems carry "voices" unaffiliated with the cable operators themselves, that concern has been addressed by the nondiscrimination and vertical ownership constraints in the 1992 Cable Act, which protect unaffiliated programmers in their

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[40] 1984 House Report at 31.

[41] 1992 Senate Report at 32.

negotiations and which require cable operators to place unaffiliated programmers on 60% of their first 75 channels. A typical Continental system offers unaffiliated channels on 94% of its channels.[42] Finally, if the statute's concern was that there was an overall scarcity of outlets for "diverse" video programming voices, that concern, too, has been well-addressed by marketplace developments. Between over-the-air broadcasters (from whom carriage can be purchased),[43] DBS providers, wireless cable systems, and a burgeoning market in the sale and rental of video tapes, anyone whose video programming has even the slightest interest to consumers can find a way to reach those consumers.

These developments coalesce to suppress leased access demand. That demand will be determined by two factors: (1) the leased access programmer's overall costs (including, but not limited to, its production costs, its marketing costs, and its carriage costs) and (2) the competition the programmer faces in the consumer market. Section 612 guarantees that leased access programmers prepared to pay a fair market price for access to a cable system cannot be denied such access. It does not guarantee that there will be enough interest in their programming to make paying the market price worthwhile. Indeed, in 1984, Congress made clear that low levels of leased access demand were not inconsistent with fair leased access rates. Congressman Wirth specifically stated that "an operator cannot be found ... to have established unreasonable rates simply because parties seeking access choose not to meet the offered rate."[44] The NPRM

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[42] Stengel Aff., ¶¶ 5-8.

[43] Schultz Aff., ¶¶ 3-5.

[44] *See* 130 Cong. Rec. 10411 (October 1, 1984). The NPRM notes the fact that low leased access demand does not indicate unreasonably high prices (¶ 24), but ignores the implications of this (continued...)

explicitly accepts this as the governing law, but then proceeds to undermine it by proposing drastic changes to bring the prices down to the negligible levels that parties seeking access will meet.

Even the 102d Congress conceded that "[t]he cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use."[45] The 1992 leased access amendments empowered the Commission to provide regulatory parameters within which fair negotiations could take place. They did not empower the Commission to try to repeal the laws of supply and demand by adjusting rates endlessly downward in an effort to stimulate "enough" leased access demand.

Because the key goals of the statute have already been achieved, it would be arbitrary for the Commission to radically restructure its leased access policies to try to force a result which Congress never intended. The market reality is that cable systems already offer highly diverse programming and that programming that cable operators do not want to carry is almost by definition programming of little or no interest to subscribers. In these circumstances, there is no basis for the NPRM's strenuous efforts to create a regulatory formula that subsidizes

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[44](...continued)
fact for the remainder of its analysis. Indeed, the NPRM seems to be proceeding from the contrary view, which is that Congress has declared that the "correct" level of demand for leased access is the maximum set-aside called for by the statute, so that the Commission's mission is to force prices ever downward until that pre-approved level of demand exists. This approach, however, flies in the face of the statute itself, which requires that maximum rates be set high enough to "assure" cable operators that they will not experience financial harm from leased access.

[45] ***See*** 1992 Senate Report at 31.

such marginal programming, at the expense of programming that subscribers actually want to receive.

VI. CONCLUSION

The Commission may not, consistent with Section 612 of the Cable Act, adopt the leased access formula contained in the NPRM. The proposal in the NPRM is totally inadequate to permit operators to recover the true costs of making a channel available for use by a leased access provider. Not only does the NPRM start with an unduly low notion of costs, it totally ignores the adverse impact that deploying substantial amounts of leased access will have on subscriber demand, as demonstrated by Continental's Broward County survey. Moreover, the NPRM ignores the substantial practical problems that will result from any immediate imposition of its proposals. Perhaps most troubling, all of these problems are being created by a proposal designed to solve a problem that does not exist, i.e., a supposed lack of unaffiliated, "diverse" voices on cable systems.

Continental submits that any formula for setting leased access rates must take full account of the actual costs of operating a cable system, as demonstrated by the record available to the Commission in connection with its review of cost-of-service systems, as well as the severe declines in subscribership that deploying leased access will create. Any such formula would produce rates much closer to the current "highest implicit fee" approach than to the negligible "rates" generated by the formula in the NPRM.

Respectfully submitted,

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May 15, 1996

Index to Attachments

ATTACHMENT 1:

AFFIDAVIT OF ROBERT A. STENGEL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access	MM Docket No. 92-266 CS Docket No. 96-60

AFFIDAVIT OF ROBERT A. STENGEL

Introduction

1. My name is Robert A. Stengel. I am Senior Vice President—Programming and Advertising at Continental Cablevision, Inc. I am Continental's senior corporate officer responsible for negotiating with programmers seeking carriage on Continental's cable systems. Among other experience in the television industry, I am a co-author of the Carnegie Commission's *Keeping Pace with the New Television,* a blueprint for several cable television programming ventures for public broadcasting.

2. The purpose of this affidavit is to provide information to the Federal Communications Commission (FCC or Commission) relevant to the proposal in a recently-released Notice of Proposed Rulemaking (NPRM) to significantly lower the rates that Continental may charge for the carriage of commercial leased access programming.

3. Based on initial analysis by Continental personnel familiar with the formula, it is my understanding that the NPRM's proposal would lower leased access rates to prices that are at best negligible. Prices this low are designed to result in a massive increase in leased access demand. Accommodating such a demand would require Continental to drop existing channels to make room for leased access, to dedicate most of the new channel capacity that will become available in the near term to leased access programming, or both. Either of these steps would have a devastating impact on Continental in the marketplace.

4. I provide information below on a number of topics that will help explain why Continental would experience severe harm in the marketplace if leased access demand were to substantially increase.

a. First, I describe the growth in the amount and diversity of programming available on cable systems over the last decade.

b. Second, I explain how Continental selects new cable programming for inclusion on its cable systems and how Continental decides whether to renew or continue carriage of programming already included on its systems.

c. Third, I explain the relationship between selecting programming that meets subscriber needs and the ability to obtain financing for rebuilding and improving cable systems.

d. Fourth, I describe the impact of competition in the multichannel video programming market on Continental's programming decisions and its position in the marketplace.

e. Finally, I provide information regarding the typical terms and expiration dates of Continental's existing contracts with programmers.

The Growth In The Availability Of Diverse Cable Programming

5. There has been a phenomenal growth in the amount and diversity of cable programming available over the last decade. At the time of the 1984 Cable Act, the majority of cable systems in the United States had the capacity to offer fewer than 30 channels of programming, including over-the-air broadcast channels, basic and premium cable programming networks.

6. In the dozen years since that time, cable programming has expanded enormously, and cable system capacity has expanded along with it. Overall, more than 80 new cable networks have been launched since 1984. Moreover, Continental's "average" system today offers fifty-six channels of video programming.

7. The programming included on Continental's systems addresses a wide range of interests. These include programming of broad interest such as news (e.g., CNN), sports (e.g., ESPN), science/education (e.g., Discovery) and general entertainment programming (e.g., USA Network), as well as programming focused on much narrower areas of interest (e.g., HGTV, the Home & Garden Channel).

8. In addition, 94% of the programming carried on Continental's systems is produced by entities unaffiliated with Continental. Continental itself has minority equity positions in only nine cable programming networks, and most of those are not yet carried on many of Continental's systems. Indeed, as described below, Continental's system-level and regional-level managers select programming for their systems based on the demands of the marketplace, not based on whether Continental has an equity interest in the programming itself.

Overview of Issues Related To Programming.

9. Cable operators like Continental are in the business of selling video programming to subscribers. A small number of customers might buy cable service simply to obtain improved reception of otherwise free over-the-air broadcast channels. These customers will generally purchase the Basic Service Tier (BST) only. The vast majority of subscribers, however, buy cable in order to obtain programming that is not available over the air, such as CNN, ESPN, the USA Network and MTV, and premium services.

10. The market for cable programming has evolved to the point that the typical cable system today will offer well-known cable networks such as these to serve as the large "anchor tenants" in a shopping mall — a Sears, a Macy's, a Nordstrom's — that attract a large base of customers. Once the customers are in the mall, they can then sample the wares of more specialized, smaller stores. By the same token, as customers visit the mall and learn what stores are there, the specialty stores themselves — at least the successful ones — acquire a base of loyal customers who return to the mall to visit them, independent of the existence of the "anchor tenants." And

over time, some customers come to the mall looking for the specialty stores in the first place. Overall, the mall will only be successful if all of these groups of customers combined produce enough traffic to support the large fixed costs of the mall.

11. The same basic process works for cable programming. Most customers are attracted to cable, at least initially, by the availability of the large, successful, well-known cable networks. Once they become cable customers, though, many people find that there are one or more "niche" channels that also interest them, and the time they spend viewing those channels grows. And, as information about those niche channels spreads (through advertising or word-of-mouth), some customers come to cable to be able to watch the niche channels. Overall, a cable system will be successful only if enough customers attracted by all of these means to allow the cable operator to cover the large fixed costs of running the cable system.

12. It should be clear from this discussion that cable operators have a very strong incentive to offer programming that customers are likely to want to watch. If a program will appeal to a large enough group of customers — even if only a niche — the cable operator will want to include it in the channel line-up. Where capacity is constrained and several cable programs are available for any channel that does open up, cable operators will want to add the programming that is most likely to bring in new customers or help retain existing customers.

13. As the overall size of cable systems has grown (Continental currently offers an average of fifty-six channels on its systems), the number of "niche" programs has also grown. Programmers have become increasingly creative in trying to identify formats or topics that will

capture the interest of an identifiable group of existing or potential viewers, and Continental has been eager to launch those programs that seem to have a reasonable prospect of success. In this sense, while Continental and the programmers have differing economic interests on matters such as the size of program license fees and the level of marketing support the programmers will receive and pay, respectively, Continental and the programmers are completely in accord in their desire for programming to succeed in the marketplace.

14. In order to make these assessments on a reasonable basis, Continental devotes substantial resources to researching consumer preferences for programming and to evaluating potential programming in light of that research. In addition to formal research such as customer surveys and focus groups, Continental also receives any number of less formal types of input from its customers, ranging from telephone calls and letters to e-mail sent to Continental's World-Wide Web site.

15. Continental's need to meet its customers' desires for programming that includes a balance of various genres means that Continental is prepared to consider any programmer who has a program that has any reasonable hope of succeeding in the marketplace, and affirmatively wants to carry those whose programs look most promising. It follows that anyone with programming that might have any significant appeal in the marketplace will not need to resort to commercial leased access. The only entities that will need to pay for carriage are those whose programming is not inherently of interest to viewers, but which, instead, needs to be thrust onto viewers in the hopes that some will watch it. The generic name for such programming is "advertising." And, indeed, in Continental's experience, the most frequent types of programming for which leased

access is sought are shopping channels, real estate "showcases,"and "infomercials" (i.e., long-form advertisements designed to look like other programs, such as a talk show.)

Specific Factors Relating To The Selection of Programming.

16. As noted above, in order to succeed in the marketplace, Continental must offer programming that a substantial number of actual and potential subscribers find valuable. By the same token, in order to succeed as a business, Continental must be able to obtain that programming under financial terms that make a fair contribution to the extensive fixed costs of operating a cable system. Balancing these concerns leads Continental to consider at least seven interrelated criteria in deciding what new channels to place on its systems.

17. **Subscriber demand.** As just noted, Continental routinely surveys its customers, formally and informally, to gauge consumer demand for specific programs and new genres of programs. Based on customer input, as well as their business judgment, Continental's managers ensure that as channel capacity becomes available, the programming launched is programming that is frequently requested by subscribers.

18. Consistent with the tendency to launch channels targeted to niche audiences, even relatively small actual or potential audiences can and do make their programming needs known. For example, historically the Eternal Word Television Network and PTL were launched on cable systems throughout the nation in response to demands by congregations in local communities.

19. In fact, for reasons alluded to above, new launches today are typically directed towards relatively small "niche" markets. The reason is that extensive video programming is already available to meet the requirements of the "market as a whole." Someone seeking to break into the "market as a whole" would face competition from, for example, the six broadcast networks (something for everyone), CNN (news), ESPN (sports), and USA Network (general entertainment), to name some of the more obvious major competitors. This creates a natural economic incentive for programmers to look for viable (i.e., unserved) niches of consumer interest. Finding and serving these niches is the essence of programmers' creative activity. It is how they create value in the marketplace that will eventually support their programming.

20. **License Fees.** New programmers seeking access to Continental systems are typically just beginning their developmental phase. Initially, they have no audience or advertiser base. For these same reasons, programmers will typically allow their new products to be launched with no license fee paid by Continental for a certain number of years. During that time, the programmers hope to develop an audience that will allow them to sell advertising in the national marketplace. With an audience established, it also becomes economically reasonable for the programmer to demand license fees from the cable operator.

21. Ultimately, the success of virtually all cable networks depends on the combination of license fees and advertising. Most observers believe, and I agree, that there is insufficient video advertising revenue available to sustain all of the available cable networks. When Continental considers a launch, it considers not merely the current compensation arrangement this year, but the fees which may be expected over time.